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No. 96 725

In The

Supreme Court of the United States

October Term, 1996

TRIDENT SEAFOODS CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This appeal raises the question of when attorney fees are subject to the cost-shifting provisions of Federal Rule of Civil Procedure 68.

Rule 68 mandates that when a defendant's Offer of Judgment exceeds the amount recovered by the plaintiff at trial, the plaintiff must pay the "costs" incurred by a defendant after the offer was served. In *Marek v. Chesny*, 473 U.S. 1 (1985), this Court held that the definition of "costs" under Rule 68 was controlled by the underlying statute on which the particular litigation was brought. Under *Marek*, whenever a statute includes attorney fees as awardable costs, such fees are subject to cost-shifting under Rule 68.

While *Marek* held that attorney fees could constitute "costs" subject to Rule 68, it did not address the nature and circumstances under which such fees could be awarded. This Petition asks the Court to set forth the circumstances under which a defendant may recover its attorney fees under Rule 68 and presents the following question of first impression:

Are the cost-shifting provisions of Rule 68 abrogated by the terms of an underlying statute which provides separate criteria for recovery of costs?

PARTIES TO THE PROCEEDING

United States Environmental Protective Agency, Respondent.

RULE 29.6 LISTING

Pursuant to Rule 29.6 Petitioner Trident Seafoods Corporation is a private corporation registered in the State of Washington with no parents or subsidiaries (other than those that are wholly owned). James Hinton and Tom Stakkland were co-defendants with Trident Seafoods at trial, but were not parties to the Ninth Circuit appeal giving rise to this Petition.

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Petitioner, Trident Seafoods Corporation ("Trident"), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The findings of fact and conclusions of law of the Unites States District Court for the Western District of Washington are unreported and are reprinted in Appendix B. The United States Court of Appeals for the Ninth Circuit issued a published opinion in this matter on August 7, 1996 reprinted in Appendix A.

STATEMENT OF JURISDICTION

The Ninth Circuit judgment and opinion were rendered on August 7, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

This Petition asks the Court to determine the relationship between Federal Rule of Civil Procedure 68 and Section 113(b) of the Clean Air Act.

Rule 68 provides as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or the effect specified in the offer, with costs then accrued. If within 10 days

> after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceeding, the party adjudged liable may make an offer of judgment, which shall have the same effect as reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Section 113(b) provides in pertinent part as follows:

> In the case of any action brought by the administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

42 U.S.C. § 7413(b).

STATEMENT OF THE CASE

A. Factual Summary

In 1988, Trident purchased an abandoned fish cannery in a small town approximately 90 miles north of Seattle and hired a local general contractor who employed a subcontractor to remove asbestos from the facility. The asbestos abatement attracted the attention of the Washington State air pollution authority which cited Trident[1] and the general contractor for failing to provide written notice of the asbestos removal. Trident paid a $250 fine for this offense.

The Environmental Protection Agency ("EPA") learned that state officers had inspected Trident's facility in September 1988, but did not notify Trident of its interest until one year later. Trident responded to EPA's inquiries in 1989, and heard nothing until 1992 when it was informed that the 1988 incident had been referred to the Department of Justice for enforcement of federal asbestos regulations promulgated under the Clean Air Act.[2]

Trident met with attorneys representing Respondent before the case was filed in an attempt to settle the dispute. Respondent's attorneys demanded $346,000 in civil penalties, a figure ten times greater than the average settlement that the Government reached in similar cases around the country. Trident objected to the Respondent's valuation of its case, but was told that $346,000 was a reasonable settlement since it would cost Trident more to litigate the case through trial.

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1. Both state and federal asbestos regulations impose strict liability on any property owner that contracts for asbestos removal on its property.

2. These work practice standards govern any "renovation" or "demolition" activity involving asbestos, and are codified at 40 C.F.R. 61, 146 (1988).

In subsequent settlement discussions, Trident's president was informed that the reason the Government was focusing on Trident was because the company had "deep pockets." Respondent's motivation was even more candidly expressed in a statement by a Department of Justice attorney to one of the co-defendants that "Trident made $30 million in sales last year and I want a piece of it!"

B. District Court Proceedings

Following the breakdown of settlement negotiations, the United States' brought suit against Trident and the two contractors who performed the asbestos abatement. Respondent alleged four substantive violations of the federal asbestos regulations and one notice violation identical to the offense that had previously been charged by the State of Washington. The district court granted summary judgment to the United States on the notice violation, but found factual questions on the four substantive charges.

At the close of discovery, Trident served Respondent with an Offer of Judgment consisting of a $30,000 cash payment and a comprehensive asbestos compliance and abatement program.[3] This offer was rejected by Respondent. Later, the parties engaged into mediation with a neutral mediator proposed by Respondent's counsel. The mediator analyzed the case and issued a letter to all parties recommending that Trident increase its Offer of Judgment to $50,000. Trident served the United States with a second Offer of Judgment identical to the

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3. Trident's initial Offer of Judgment committed the company to (1) pay a $30,000 civil penalty; (2) institute a $141,000 compliance program; and (3) spend $100,000 on asbestos abatement over the next 18 months. *See* Appendix C.

settlement package recommended by the mediator.[4] Respondent rejected the offer and pushed the case to trial.

Following a jury trial, a defense verdict was rendered on all four remaining counts. Trident was assessed a $64,000 civil penalty for the notice violation and appealed this judgment to the Ninth Circuit. The Ninth Circuit reversed the penalty and, on remand, the district court reduced its judgment to $25,000. Thus, the judgment ultimately rendered in this case was substantially less than the cash component of the two Offers of Judgment that Trident served on Respondent before trial.

Trident filed motions at the district court level to recover its costs, including attorney fees, under Rule 68, Section 113(b) of the Clean Air Act and 28 U.S.C. § 2412. The district court held Trident could not recover its attorney fees under Rule 68, reasoning as follows:

> This Court concludes that Rule 68 (Offer of Judgment) does not apply to the United States as a plaintiff in an action brought under the Clean Air Act. The basis for awarding attorney's fees has been laid out by Congress in the Clean Air Act, and will not be expanded here.

The district court faulted Respondent for pushing the case to trial with excessive settlement demands, but concluded that the Government's conduct was not so unreasonable to warrant an award of attorney fees under Section 113(b). Nevertheless, the district court held that Trident was entitled to recover its statutory costs under 28 U.S.C. § 2412 and taxed costs against the United States in the amount of $21,000.

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4. Trident's second Offer of Judgment was identical to the previous offer, except that it increased the civil penalty to $50,000. *See* Appendix D.

C. Appeal to Ninth Circuit

Trident appealed the denial of its motion for attorney fees to the United States Court of Appeals for the Ninth Circuit.[5] The United States cross-appealed, assigning error to the district court's taxation of costs.

The Ninth Circuit affirmed the district court, holding that Trident could not recover its attorney fees under Rule 68. In reaching this conclusion, the Ninth Circuit held that *Marek* only mandates fee-shifting where the defendant satisfies the substantive criteria for attorney fee awards set forth in the underlying statute. The Ninth Circuit held that since Section 113(b) of the Clean Air Act provides for an award of costs, including attorney fees, in cases where the government's conduct was "unreasonable," Trident could not recover its costs, including attorney fees, under Rule 68 absent a finding of unreasonableness. Because the Ninth Circuit concluded that the district court had acted within its discretion in concluding that Respondent was not unreasonable, Trident could not recover its costs, including attorney fees, under Rule 68.

Although the Ninth Circuit held that the Clean Air Act was the only vehicle under which Trident could recover its attorney fees, the court nevertheless affirmed the district court's award of statutory costs. In contrast to the reasoning used to deny Trident's request for attorney fees under Rule 68, the Ninth Circuit found that Section 113(b) does not specifically prohibit cost awards under 28 U.S.C. § 2412.

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5. Trident sought review of both the district court's denial of attorney fees under Rule 68 and Section 113(b) of the Clean Air Act. This Petition is only addressed to Trident's right to attorney fees under Rule 68.

REASONS FOR GRANTING THE WRIT

This Petition presents an important question of federal law which has not been, but should be, settled by this Court: Are the cost-shifting provisions of Rule 68 abrogated by an underlying statute that provides separate criteria for the recovery of costs?

I.

THE NINTH CIRCUIT'S DECISION FRUSTRATES THE PURPOSE OF RULE 68 AND UNDERMINES THIS COURT'S HOLDING IN *MAREK V. CHESNY.*

The Ninth Circuit's holding renders Rule 68 completely inoperative since there could never be a situation where a defendant would be able to recover costs, including attorney fees, under Rule 68 where the defendant was not already entitled to costs and fees under Section 113(b) of the Clean Air Act. If this Court allows the Ninth Circuit's ruling to stand, Clean Air Act defendants will have no incentive to make Offers of Judgment and plaintiffs will have no incentive to accept such offers.

Federal Rule of Civil Procedure 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The Federal Rules of Civil Procedure have "the force of a federal statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). When construing the interrelationship between two statutory provisions, courts must give the statutes a sensible reading that avoids redundancy or surplusage. *Gustafson v. Alloyd Co.*, __ U.S. __, 115 S. Ct. 1061, 1065 (1995). The Ninth Circuit's analysis, however, completely undermines this Court's holding in *Marek* and robs Rule 68 of any independent operative force.

"The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Marek*, 473 U.S. at 4. *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). Rule 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." *Marek*, 473 U.S. at 4. "Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer" and forces plaintiffs and their attorneys to "think very hard about whether continued litigation is worthwhile." *Id.* at 10-11. A plaintiff who rejects an offer of judgment "assume[s] the risk that the outcome of the case will be less favorable than the offer, on pain of having to pay the costs subsequently incurred by the offeror." *Gay v. Waiters' and Dairy Lunchmen's Union Local 30*, 86 F.R.D. 500, 502 (N.D. Cal. 1980).

This case represents the type of litigation practices Rule 68 was designed to prevent. From the outset of this litigation, Justice Department attorneys inflated the value on their case against Trident. In an effort to extract a "piece" out of Trident's "deep pockets," Respondent demanded that Trident reach a settlement ten times above the national average for similar cases. Respondent justified their settlement demands to Trident based upon the costs Trident would incur to litigate the case through trial. Trident responded by serving Offers of Judgments on the United States to encourage a serious

evaluation of the risk and costs of litigation and to balance them against the likelihood of success at trial. Respondent rejected each of these offers and ignored the advice of its proposed mediator, thereby pushing the case to a costly and unnecessary trial. Application of Rule 68 to this case will encourage reasonable settlements and deter unnecessary litigation by holding the Respondent to the consequence of its actions.

II.

TRIDENT'S ATTORNEY FEES ARE "PROPERLY AWARDABLE" UNDER *MAREK*.

Although Rule 68 explicitly shifts costs to the plaintiff, the rule does not specify which litigation expenses are cognizable as "costs." In *Marek*, this Court considered for the first time whether attorney fees were subject to cost-shifting in a civil rights action brought under 42 U.S.C. § 1983. After evaluating the purpose of Rule 68, this Court held that the term "costs" encompasses "all costs properly awardable under the relevant substantive statute . . ." *Marek*, 473 U.S. at 9-10. Where the underlying statute includes attorney fees as recoverable costs, such fees are subject to the cost-shifting provisions of Rule 68.

In holding that Trident could not recover attorney fees under Rule 68, the Ninth Circuit concluded that, in Clean Air Act cases, attorney fees are only "properly awardable" where the defendant satisfied the substantive requirements of Section 113(b). Because Respondent had not been sufficiently "unreasonable" to warrant an award of attorney fees under Section 113(b), the Ninth Circuit concluded that Trident could not recover its attorney fees under Rule 68.[6]

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6. The Ninth Circuit's analysis was in accord with the First Circuit's holding in *Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986), *cert. denied*,

(Cont'd)

Throughout the Clean Air Act, costs are defined in the following manner: "costs of litigation (including reasonable attorney and expert witness fees)." 42 U.S.C. §§ 300j-8(d), 7413(b), 7413(d)(5)(B), 7524(c)(6), 7604(d), 7607(f), 7622(b)(2)(B). Because Congress expressly included attorney's fees as "costs of litigation" awardable in a CleanAir Act suit, "such fees are subject to the cost-shifting provision of Rule 68." *Marek*, 473 U.S. at 9. The Ninth Circuit therefore erred in affirming the district court's denial of Trident's motion for attorney fees.

(Cont'd)

481 U.S. 1029 (1987), a civil rights case in which the Court held that attorney fees were not subject to Rule 68 unless the substantive requirements of the underlying statute were satisfied. The Court reasoned that since a plaintiff's action must be "frivolous, unreasonable or without foundation" to warrant attorney fees under 42 U.S.C. § 1988, such fees could not be awarded under Rule 68 unless that same standard was satisfied. *Id.* at 333. Similar holdings have also been reached by the Fourth Circuit in *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996), the Sixth Circuit in *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291, 296 (6th Cir. 1989), and by the Eighth Circuit in *O'Brien v. City of Greers Ferry*, 878 F.2d 1115, 1120 (8th Cir. 1989).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 7, 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-35989
95-35074

D.C. No. CV 92-1025-CRD

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

TRIDENT SEAFOODS CORPORATION,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
April 10, 1996 — Seattle, Washington

Filed August 7, 1996

Before: Eugene A. Wright, Harry Pregerson and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

Appendix A

OPINION

COUNSEL

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Ralph H. Palumbo, Heller, Ehrman, White & McAuliffe, Seattle, Washington, for the defendant-appellant-cross-appellee.

Daniel T. Fitzpatrick, Pacific Legal Foundation, Sacramento, California, for the amicus curiae.

TASHIMA, Circuit Judge:

The United States brought an action against Trident Seafoods Corporation (Trident) for violating the Clean Air Act. Trident made an offer of judgment before trial, which the United States rejected. Because the offer of judgment exceeded the final judgment, Trident moved for an award of attorneys' fees and costs pursuant to Fed. R. Civ. P. 68. The district court denied Trident an award of fees, but granted an award of costs. Trident appeals the order denying fees, and the United States cross-appeals the order awarding costs. We affirm.

BACKGROUND

Trident is a seafood processing corporation. In May 1988, the company purchased and began to renovate an abandoned fish cannery in Anacortes, Washington. To remove asbestos insulation from the facility, Trident hired James Hinton, a

general contractor. He in turn hired a subcontractor, Thomas Stakkeland, who removed over five tons of asbestos during five days in August and September 1988. Stakkeland, who was not certified at the time to remove asbestos, used his eleven-year-old son and a person with no prior experience in asbestos removal to assist in the clean-up. After the clean-up was supposedly completed, at least five bags of asbestos were left at the facility.

On September 26, 1988, an asbestos inspector for a state agency, the Northwest Air Pollution Control Authority (NWAPCA), learned of the asbedstos removal and inspected the facility. During the inspection, he removed samples of suspected asbestos for analysis. The results showed that all samples contained more than one percent asbestos.

On September 30, 1988, Trident notified the government of its intent to remove the asbestos. On October 5, 1988, the five bags of asbestos left by Stakkeland were removed from the Anacortes facility. The inspector also returned and removed additional samples from the facility, which again tested positive for asbestos.

Trident eventually hired a new asbestos contractor to remove the remaining asbestos at the Anacortes facility. Twenty-five bags were removed on October 14, 1988. NWAPCA cited Trident for failing to provide advance written notice of the planned asbestos abatement. As a result, Trident paid a $250 fine to the State of Washington.

The Environmental Protection Agency (EPA) also learned of the asbestos abatement of the Ancortes facility. The Clean Air Act authorizes the EPA to develop National Emission

Standards for Hazardous Air Pollutants (NESHAP). 42 U.S.C. §§ 7412(c) and 7414(a) (1988).[1] The asbestos NESHAP provides notice requirements and work practice standards that must be met when renovating or demolishing a facility that contains asbestos. 40 C.F.R. pt. 61, subpt. m (1988). A violation of NESHAP constitutes a violation of the Act. 42 U.S.C. §§ 7412(c) and (e) (1988).

In August 1989, the EPA served Trident with a request for information regarding the abatement of asbestos at the Anacortes facility. Trident responded that same month. Nearly three years later, on April 8, 1992, the United States Department of Justice (DOJ) notified Trident that the EPA had referred the asbestos abatement matter to the DOJ, which intended to file an action against Trident for violations of § 7413(b) of the Clean Air Act, 42 U.S.C. § 7413(b). The DOJ explained that its purpose in notifying Trident was to give the company an opportunity to settle the matter before it filed a complaint.

According to Trident, settlement negotiations took place in April 1992, during which the DOJ stated that it was pursuing the action because "Trident has deep pockets" and because the United States wanted "a piece" of $30 million Trident earned in sales the previous year. The government contended that Trident would likely incur more than $346,000 in litigation expenses and risk a liability judgment of more than $3 million, if the company proceeded to trial. The government, therefore, offered to settle the action for $346,886. Trident rejected the offer. Its research indicated that the average settlement in 1992 for alleged violations of NESHAP was between $20,000 and $35,000.

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1. Because this action arose in 1988, the 1988 versions of the Clean Air Act and related regulations govern these proceedings.

Appendix A

On June 29, 1992, the DOJ filed an action on behalf of the United States against Trident. The complaint alleged one notice violation and four work practice violations of the asbestos NESHAP as a result of the asbestos abatement at the Anacortes facility. Stakkeland and Hinton were named as individual defendants.

During discovery, the government noticed depositions of Trident's President and Vice President to take place during the Christmas holidays. These depositions were rescheduled, however, when the trial date was continued. The government also caused Trident employees and officers to be served at their homes by United States Marshals, even though Trident's in-house counsel agreed to accept trial subopenas on behalf of all company employees.

On May 3, 1993, Trident served the government with an offer of judgment pursuant to Fed. R. Civ. P. 68. The offer included a civil penalty of $30,000, as well as a consent decree to; (1) conduct a survey of all Trident vessels and shore facilities; (2) institute a company-wide asbestos control program; and (3) expend at least $100,000 on asbestos abatement within two years. The government rejected the offer on May 19, 1993.

On July 3, 1993, Trident served the government with a superseding Rule 68 offer of judgment, which was identical to the previous offer, except that it increased the civil penalty to $50,000. The government again rejected the offer.

On July 22, 1993, the district court granted summary judgment in the government's favor on the claim that Trident violated the NESHAP notice requirement by failing to provide

advance written notice to the EPA of its intent to remove asbestos.

Shortly before trial, the government made a settlement demand in the amount of $125,000, which Trident rejected. The trial, which began in August 1993, resulted in a jury verdict in favor of Trident on all four charges of work practice violations. The district court assessed a penalty for the NESHAP notice violation in the amount of $65,000, finding that the violation was continuous with mitigating factors.[2]

Trident moved for an award of attorney's fees and costs pursuant to (1) Rule 68, (2) the Equal Access to Justice Act (EAJA), and (3) the Clean Air Act. The court denied the motion for attorney's fees, but granted the motion for statutory costs pursuant to the EAJA.

Trident appealed the $65,000 penalty and we reversed, finding that the violation was singular rather than continuous. United States v. Trident Seafoods Corp., 60 F.3d 556, 557 (9th Cir. 1995). We remanded the action and directed the district court to impose a new penalty not to exceed $25,000. On remand, the district court entered judgment imposing a penalty of $25,000, less $250 already paid.

Trident now appeals the order denying attorneys' fees. In a consolidated appeal, the government seeks review of the order awarding costs. We have jurisdiction over these timely appeals under 28 U.S.C. § 1291, and we affirm.

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2. Smaller penalties were also assessed against Hinton ($2,500) and Stakkeland ($5,000).

Appendix A

DISCUSSION

I. ATTORNEYS' FEES

Trident contends that is entitled to attorneys' fees as part of the costs awardable under Rule 68. We review the issue de novo. Erdman v. Cochise County, 926 F.2d 877, 879 (9th Cir. 1991) (citing Simon v. Intercontinental Transp. (ICT) B.V., 882 F.2d 1435, 1439 (9th Cir. 1989)). Under Rule 68, if a plaintiff rejects a defendant's offer of judgment, and the judgment finally obtained by plaintiff is not more favorable than the offer, the plaintiff must pay the costs incurred subsequent to the offer.[3] Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 442 (9th

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3. Rule 68 provides, in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Fed. R. Civ. P. 68.

Cir. 1982). The award is mandatory; Rule 68 leaves no room for the court's discretion. Id.

The minimum value of Trident's offer of judgment is indisputably $50,000. On December 18, 1995, the district court entered a final judgment imposing a penalty of 25,000 against Trident. Thus, the offer of judgment exceeds the final judgment.

The term "costs" in Rule 68 is intended to refer to all costs properly awardable under the relevant substantive statute. Marek v. Chesny, 473 U.S. 1, 9 (1985). Absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for purposes of Rule 68. Id. To determine the interplay between Rule 68 and the Clean Air Act, the Court must construe the "plain meaning" interpretation of both the Rule and the statute in a manner that gives meaning to every word in each. Id. at 3017.

The Clean Air Act indicates that Congress did not intend to award attorneys' fees unless the action was unreasonable. The Act provides:

> In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

42 U.S.C. § 7413(b). The only interpretation that gives meaning to every word in both Rule 68 and the Clean Air Act is the

"costs" in Rule 68 include attorneys' fees only if the action was unreasonable.

Trident contends that this interpretation frustrates the purpose of Rule 68 by robbing it of any independent operative force. According to Trident, if attorneys' fees are awardable under Rule 68 only if the action was unreasonable, there could never be a case where attorney's fees would be awarded under Rule 68 when such fees were not already awardable under the Clean Air Act. Rule 68 is not intended to expand the bases for recovery of attorneys' fees. Rather, the purpose of Rule 68 is to encourage settlement by forcing the parties "to 'think very hard' about whether continued litigation is worthwhile . . . ." Marek, 473 U.S. at 5, 11. An interpretation of Rule 68 "costs" that includes attorneys' fees if the government brings an unreasonable § 7413(b) action is likely to force the government to scrutinize more closely the reasonableness of its action when faced with an offer of judgment. If the government concludes that the court is likely to find that the action is unreasonable, the offer of judgment is more likely to be accepted.

Trident also cites numerous cases for the proposition that the EAJA allows a party to recover attorneys' fees under Rule 68 in a § 7413(b) action. See Thomas v. Peterson, 841 F.2d 332, 334 (9th Cir. 1988); Natural Resources Defense Council, Inc. v. United States EPA, 703 F.2d 700 (3rd Cir. 1983); Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915, 918 (D.C. Cir. 1983); Gavette v. Office of Personnel Management, 808 F.2d 1456, 1464-65 (Fed. Cir. 1986). Each of these cases is distinguishable, however, on the ground that it concerned § 2412(d)(1)(A) of the EAJA — a provision not relevant here for the purpose of determining whether attorneys' fees should be awarded. The EAJA does not define "costs" to include

attorneys' fees. See 28 U.S.C. § 2412(a)(1). Fees instead are defined separately. 28 U.S.C. §§ 2412(d)(1)(A) & (C)(2)(A). Thus, because attorneys' fees are not properly awardable as "costs" under § 2412(d)(1)(A), they are not within the scope of Rule 68. See Marek, 473 U.S. at 9 (Rule 68 "costs" include attorneys' fees only where "underlying statute defines 'costs' to include attorney's fees").

Accordingly, Trident is entitled to attorneys' fees only if the action was unreasonable.

A. Standard of Review

The district court found that the action against Trident was reasonable. The standard of review to be applied to such a finding under § 7413(b) is an issue of first impression. We review a similar determination by the district court under the EAJA for an abuse of discretion. Kali v. Bowen, 854 F.2d 329, 334 (9th Cir. 1988). The EAJA permits a prevailing party to recover attorneys' fees "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A).

We apply an abuse of discretion standard to the court's determination under § 2412(d)(1)(A) whether or not the United States' position was "substantially justified" in accordance with the Supreme Court's decision in Pierce v. Underwood, 487 U.S. 552 (1988). In determining the proper standard to be applied the Supreme Court noted in Pierce that § 2412(d)(1)(A) explicitly requires the district court to make the determination whether the position was substantially justified. Id. at 559. The Court reasoned, moreover, that deference should be accorded to the district court because it is

better positioned to decide the issue, given its full knowledge of the factual setting and insights not conveyed by the record. Id. Finally, the Court considered the impracticality of formulating a rule of decision for determining whether the government's position was "substantially justified." The Court concluded that "the question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." Id. at 562.

The same considerations as in Pierce persuade us that an abuse of discretion standard should be applied to a district court's determination of whether an action is unreasonable under § 7413(b). As in Pierce, deference should be accorded to the district court because § 7413(b) explicitly requires the district court to determine the issue. And again, as in Pierce, the government's reasonableness in bringing the action is at issue. Thus, the district court is better positioned to determine the issue, and a formulaic rule is not likely to be helpful.

We find an abuse of discretion if the district court bases its decision on an erroneous conclusion of law or on an irrational interpretation of the evidence. Williams v. Bowen, 966 F.2d 1259, 1260-61 (9th Cir. 1991) (quoting Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988)).

B. The Law

We begin our review with an analysis of the applicable law. Courts also have yet to articulate a test for determining whether an action is unreasonable under § 7413(b). The district court

applied the Ninth Circuit's test for determining whether the government's position was "substantially justified" under the EAJA. Applying this test was not erroneous because it requires a finding that the action had a reasonable basis both in law and fact. See Wilderness Soc'y v. Babbitt, 5 F.3d 383, 388 (9th Cir. 1993) ("[w]here the Government can show that its case had a reasonable basis both in law and fact, no award will be made") (quoting League of Women Voters v. FCC, 798 F.2d 1255, 1257 (9th Cir. 1986)). Section 7413(b) provides for an award of attorneys' fees "if the court finds that such action was unreasonable." 42 U.SC. § 7413(b). Thus, the district court applied a test properly based on the plain language of the statute.

The district court concluded that the action was reasonable based on "the facts of this case and given the clear dictates of the law." In so concluding, the court correctly reasoned that a strict liability standard applied to NESHAP violations. See United States v. Sealtite Corp., 739 F. Supp. 464, 468 (E.D. Ark 1990); United States v. Hugo Key and Son, Inc., 731 F. Supp. 1135, 1137 (D.R.I. 1989); United States v. Ben's Truck and Equip. Inc., 25 Env't Rep. Cas. (BNA) 1295, 1298 (E.D. Cal. 1986); see also H.R. Rep. No. 294, 95th Cong., 1st Sess. 70 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1148 ("[P]ersons who own or operate pollution sources in violation of . . . health regulations must be held strictly accountable. . . . Thus, the committee believes that the remedial and deterrent purposes of the civil penalty provision would be better served by not limiting its application to 'knowing' violations.") Thus, given the governing law, the district court correctly concluded that the action had a reasonable legal basis.[4]

4. Another potential issue of first impression is whether the government's conduct prior to filing the action should also be considered in

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Appendix A

C. The Evidence

The district court also based its decision on a rational interpretation of the evidence. In finding that the action was reasonable, the court considered the government's manner of pursuing the action. For example, the court noted the government's ten-month delay in notifying Trident of the NESHAP violations and its nearly four-year delay in prosecuting the action. The court also noted the government's "excessive" litigation tactics and that its settlement position exceeded the average settlement in a Clean Air Act case by ten times. Analysis of the government's conduct caused the court to remark that it could "well understand Trident's frustration with the Government's pursuit of this case and its failure to settle."

Trident's methods for asbestos abatement were undoubtedly inadequate. The undisputed facts show that Trident failed to provide advance written notice to the EPA of the planned asbestos abatement. It is also undisputed that, after the abatement was supposedly completed, bags of asbestos still remained at the Ancortes facility; samples taken from the facility still tested positive for asbestos; and Trident ultimately hired new contractors to complete the clean-up. Thus, although the government may not deserve commendation for the manner in which the action was maintained, its legal and factual foundation cannot reasonably be disputed. Therefore, the

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determining if the action is reasonable. We need not reach that question here, however, because the district court explicitly considered the government's pre-filing conduct in finding that the action was reasonable. Thus, there is no issue whether failure to consider the government's conduct prior to filing the action resulted in an erroneous application of the law.

district court's finding that the action was reasonable should not be disturbed. See Arizona v. Thomas, 824 F.2d 745, 749 (9th Cir. 1987) (courts have been "careful to defer to EPA's choice of methods to carry out its 'difficult and complex job' so long as that choice is reasonable and consistent with the Clean Air Act") (quoting Connecticut Fund for Env't, Inc. v. EPA, 672 F.2d 998, 1006 (2nd Cir.), cert. denied, 103 S. Ct. 445 (1982)).

II. COSTS

The district court awarded Trident its statutory costs as the prevailing party pursuant to § 2412(a)(1) of the EAJA, with provides in relevant part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency . . . of the United States . . . in any court having jurisdiction of such action.

28 U.S.C. § 2412(a)(1). The United States contends that this provision of the EAJA is preempted by § 7413(b) of the Clean Air Act, which permits an award of costs only if the district court finds that the action was unreasonable. According to the government, the Clean Air Act provides the sole basis for an award of costs because the EAJA is displaced where "otherwise specifically provided by statute." 28 U.S.C. § 2412(a)(1).

We review questions of statutory construction de novo, based upon the following guidelines:

First, if the statutory language is clear, we need look no further than that language itself in determining the meaning of the statute. Certainly that is true if there is no clearly expressed congressional intent to the contrary. Second, to the extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one. Finally, Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted. Hellon & Assoc., Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992) (citations and quotations omitted).

We begin our analysis with the plain language of Clean Air Act § 7413(b) and EAJA § 2412(a)(1). Hellon; Pacific Mut. Life Ins. Co. v. American Guar. Life Ins. Co., 722 F.2d 1498, 1500 (9th Cir. 1984) ("primary rule is to ascertain and give effect to the plain meaning of the language used") (citing Hughes Air Corp. v. Public Util. Comm'n, 644 F.2d 1334, 1337 (9th Cir. 1981)). According to the EAJA's plain language, costs are recoverable for the prevailing party in all actions against the United States, unless "otherwise specifically provided by statute." 28 U.S.C. § 2412(a)(1). The Clean Air Act's plain language provides that a party defending against the United States in an action under the Clean Air Act may recover costs if the government's action is unreasonable. 42 U.S.C. § 7413(b). Whether these statutes provide alternative or mutually exclusive bases for costs awards is not made clear by their plain words. We are, therefore, unable to end our analysis here.

The next step is to determine whether the statutes may be read harmoniously. Hellon, 958 F.2d at 297; see also Pacific Mut., 722 F.2d at 1500 ("The words of a statute must be

construed in context and the statutes must be harmonized, both internally and with each other to the extent possible.") These statutes may be harmonized if they are interpreted to provide independent bases for the recovery of costs. Thus, a defendant may recover costs (including attorney and expert witness fees) under § 7413(b), if the government's action was unreasonable, whether or not the defendant prevails. This interpretation is not new. See Pierce, 487 U.S. at 569 ("Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose.")

In contrast, a prevailing plaintiff or defendant may recover costs (but no attorney or expert witness fees) under the EAJA, whether or not the action was reasonable, unless costs are specifically precluded by another statute. See SEC v. Kaufman, 835 F. Supp. 157, 159 (S.D.N.Y. 1993) ("Costs are available under EAJA § 2412(a)(1) only when not specifically precluded by another statute.") (denying costs under EAJA in action brought under Securities Exchange Act of 1934, which provides that "[n]o costs shall be assessed for or against the Commission in any proceeding under this chapter" (15 U.S.C. § 78aa)); see also Tulalip Tribes v. FERC, 749 F.2d 1367 (9th Cir. 1984) (denying costs under EAJA in action brought under Federal Power Act, which provides that "no costs shall be assessed against the commission in any judicial proceeding under this chapter." (16 U.S.C. § 825p)), cert. denied, 474 U.S. 900 (1985). The more specific statute barring costs awards creates an irreconcilable inconsistency and thus trumps the more general EAJA. See Hellon, 958 F.2d at 297. Section 7413(b) does not specifically preclude costs; it simply provides that costs may be awarded if the court finds that the action was unreasonable. Thus, there is no irreconcilable inconsistency.

The government contends that the two statutes are not intended to be read harmoniously. Specifically, the government argues that § 2412(d)(1)(A)'s exception clause, "[e]xcept as otherwise specifically provided by statute," indicates that EAJA's cost-shifting provision is intended only as a "gap-filler"; therefore, it should not be applied here because the Clean Air Act's more restrictive cost-shifting provision already applies.

However, the purpose of the EAJA is to "reduce the deterrents and disparity" in contesting government action. H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 6 (1980), reprinted in 1980 U.S.C.C.A.N. 4984. An interpretation of the EAJA that permits costs awards in actions under the Clean Air Act only if the government was unreasonable undermines the EAJA's purpose. If a private party is not assured of recovering its costs even when it prevails in an action against the government, its incentive to adjudicate its rights is likely to be deterred by the perception that it is more practical to endure an injustice than contest it.

An analogous provision in the EAJA also belies any congressional intent to award costs only if the government was unreasonable, regardless of whether the private litigant prevails. The EAJA's provision for shifting attorneys' fees (Section 2412(d)(1)(A)) begins with the identical exception clause "[e]xcept as otherwise specifically provided by statute." To determine the purpose of this exception clause, several Circuits have looked to the provision's legislative history.[5] See

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5. Section 2412(d)(1)(A) states:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the

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Gavette, 808 F.2d at 1464); Environmental Defense Fund, Inc., 716 F.2d at 917-19; United States v. 329.73 Acres of Land, 704 F.2d 800, 805-06 (5th Cir. 1983); Natural Resources Defense Council, 703 F.2d at 704-06. A House Report on the EAJA states:

> [S]ection [2412(d)(1)(A)] is not intended to replace or supercede any existing fee-shifting statutes such as the Freedom of Information Act, the Civil Rights Acts, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 189 (1980), reprinted in 1980 U.S.C.C.A.N. at 4997.

Given the purpose of the EAJA, there is no reason not to

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> United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

give the exception clause in the EAJA's cost-shifting provision the same meaning as in its free-shifting provision. Neither the legislative history nor the language of the EAJA justifies an interpretation of the EAJA that expands the bases for recovery of attorneys' fees but restricts the availability of costs awards. The Clean Air Act and the EAJA may be read harmoniously if they are interpreted to provide alternative bases for the recovery of costs. Under this construction, the exception clause in the EAJA's cost-shifting provision precludes application of the statute only if another statute allows costs even if the litigant does not prevail, or specifically bars costs awards, thus creating an irreconcilable conflict.

We finally observe that "Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted." Hellon, 958 F.2d at 297. Since Congress waived the United States' immunity to liability for costs awards long before § 7413(b) was enacted in its present form, Congress is presumed to have been aware that costs were already recoverable for prevailing parties in actions against the government when it provided that the government's unreasonableness was a basis for recovery in actions under the Clean Air Act. Id. Yet, the Clean Air Act does not state that costs are available only if the Government was unreasonable, nor does it state that costs may not be recovered unless the Government was unreasonable. Rather, the Clean Air Act provides that "the court may award costs . . . if the court finds that such action was unreasonable." Thus, nothing in the language indicates an intent to preclude application of the previously enacted EAJA.

III. SOVEREIGN IMMUNITY

The government argues that the Clean Air Act provides a narrow waiver of sovereign immunity which governs the award of costs in this action. Waivers of immunity must be strictly construed in favor of the sovereign. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983); United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ardestani v. I.N.S., 502 U.S. 126, 137 (1991). They must not be "enlarged beyond what the language requires." Ruckelshaus, 463 U.S. at 686. "Neither, however, should we assume to narrow the waiver that Congress intended." United States v. Idaho, ex rel. Director, Idaho Dep't of Water Resources, 113 S. Ct. 1893, 1896 (1993) (quoting Smith v. United States, 507 U.S. 197, 203 (1993)).

This argument merely reiterates the government's argument that the Clean Air Act's more limited waiver should trump the general waiver of the EAJA, given the latter's exception clause. However, here, as explained above, Congress has left no doubt that it intended to waive the government's immunity to costs awards. On this basis we have concluded that Congress intended that the costs provision of the EAJA apply to § 7413(b) actions. Therefore, the district court did not err in taxing costs against the government.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE FILED AUGUST 2, 1994

UNITED STATES DISTRICT COURT WESTERN
DISTRICT OFWASHINGTON
AT SEATTLE

No. C92-1025D

UNITED STATES OFAMERICA,

Plaintiff,

v.

TRIDENT SEAFOODS CORPORATION JAMES HINTON, andTOM STAKKELAND,

Defendants.

ORDER DENYING TRIDENT'S MOTION
FORATTORNEY'S FEES

THIS MATTER is before the Court on two motions of defendantTrident Seafoods Corporation ("Trident") for costs and attorneys' fees pursuant to (1) Fed. R. Civ. P. 68 (offer of judgment) for costs incurred after May 3, 1993; and (2) to the Equal Access to Justice Act (EAJA) and the Clean Air Act. After full consideration of the briefs and declarations filed by counsel, the Court deniesTrident's motions as unsupported by law and fact under the circumstances of this case.

This case has already had a rather protracted history before this Court. In the spring of 1993, the United States moved for summary judgment on all of its claims against Trident for

violation of the National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 C.F.R. pt. 61, subpt. m, in its removal of asbestos from its facilities. NESHAP was promulgated pursuant to the Clean Air Act (42 U.S.C. §§ 7412(c) and 7414(a)). Trident countermoved for summary judgment on all but one claim. On July 22, 1993, the Court granted summary judgment in favor of the United States on one of its claims — failure to follow the written notice requirement — and denied the remainder as involving factual issues. Trident's motion was denied.

The case was tried to a jury in August 1993, with the jury returning a verdict in favor of defendants. Subsequently, the Court assessed a NESHAP penalty against Trident for the failure to follow the NESHAP notice requirement in the amount of $65,000.

FEDERAL RULE OF CIVIL PROCEDURE 68

Trident argues for application of Fed. R. Civ. P. 68 to its offer of judgment on May 3, 1993.[1]

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1. Rule 68 reads as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effects specified in the offer, with costs then accrued . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Appendix B

On May 3, 1993, Trident made an offer of judgment to the United States which included a $30,000 civil penalty. In addition, Trident offered a consent decree to (a) institute a company-wide asbestos control program; (b) conduct an asbestos survey of all vessels and shore facilities; and (c) expend at east $100,000 on asbestos abatement. Trident valued this offer at $271,181.25. On July 2, 1993, Trident offered $50,000 in civil penalty and offered a consent decree essentially the same as the May 3 offer. Trident valued this offer at $291,181.25. The government accepted neither offer.

Trident, therefore, contends that its offers exceeded the amount plaintiff ultimately gained, and thus, Trident is entitled to attorneys' fees and costs. Trident relies on the provision in the Equal Access to Justice Act (28 U.S.C. § 2412(b)) stating that the United States is liable to the same extent as any other party under common law or statute, to apply Rule 68 to the United States.

The United States opposes the Rule 68 motion on three grounds:

1. Waiver of sovereign immunity should be read narrowly and does not apply where a more specific waiver exists;

2. Rule 68 does not fall under common law or statute as required in the EAJA; and

3. Trident's offer of judgment was vague and unquantifiable.

Because the Clean Air Act at 42 U.S.C. 7413 limits an award of attorneys' fees or costs to an action brought by the

Administrator which was "unreasonable", the government argues that Rule 68 was not intended to apply to cases in which the United States was the plaintiff. A waiver of sovereign immunity is narrowly construed in favor of the United States and will not expanded beyond the statute's language. Any waiver of the National Government's sovereign immunity must be explicit. *See United States v. Mitchell*, 445 U.S. 535, 538-539 (1980).

> Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon v. United States*, 342 U.S. 25, 27 (1951), and not "[enlarged] ... beyond what the language requires." *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).

Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983).

On its second point, the United States argues that the provision in the EAJA that the "United States shall be liable ... to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award" by its very terms, does not apply to a Rule.

Trident cites to only one case in which a Rule 68 claim against the United States was recognized. *Washington v. United States*, 8 Cl. Ct. 693 (1985). The issue there was a motion to extend the ten-day period for consideration of an offer of settlement. The court declined to do so. There was no discussion of whether or not Rule 68 applied to the United States as a plaintiff.

Appendix B

This Court found only one other case discussing Rule 68 in conjunction with the United States' rejection of an offer of judgment. *United States v. American Commercial Barge Line Company,* 988 F.2d 860 (8th Cir. 1993). In this admiralty case, the court discussed Rule 68 with regard to a denial by the trial court of prejudgment interest for the United States for the period after the United States rejected an offer of judgment. The Eight Circuit reversed and remanded, concluding that the rejection of the offer would not eliminate prejudgment interest, which is a part of damages in an admiralty action. There was no discussion of Rule 68's application to the United States. Interestingly, the Eighth Circuit did note that Rule 68 only provided for a reimbursement of costs, with costs limited to such items as "filing fees or witness fees". *Id.* at 864.

Trident contends that its request for an award of attorneys' fees in addition to costs is supported by *Marek v. Chesny,* 473 U.S. 1 (1985). The *Merek* court held that Rule 68 "costs" included attorneys' fees where the underlying civil rights statute provided for attorneys' fees for the prevailing party. *Merek,* however, was not a case involving the United States, nor was it a case brought under the Clean Air Act. The Clean Air Act, under which this case was brought, does not provide for an award of attorneys' fees to the prevailing party. Rather, as noted above, an award of attorneys' fees requires unreasonable conduct by the government. This will be discussed further in the next section.

In its final argument, the government contends that with the exception of the civil penalties, it was impossible to value the two Trident offers. Most of the consent decree offers were merely an agreement to do what Trident was required to do under the law or had already undertaken to do. The value of this offer to the United States was marginal.

This Court concludes that Rule 68 (offer of judgment) does not apply to the United States as the plaintiff in an action brought under the Clean Air Act. The basis for awarding attorneys' fees has been laid out by Congress in the Clean Air Act, and will not be expanded here.

EQUAL ACCESS TO JUSTICE ACT AND CLEAN AIR ACT

On an alternative theory, Trident argues that it is entitled to attorneys' fees and costs pursuant to EAJA (28 U.S.C. § 2412(d)(1)(A)[2] or the Clean Air Act (42 U.S.C. § 413(b)[3] These statutes provide for an award against the United States where its position was not substantially justified (EAJA)or was unreasonable (Clean Air Act). Trident insists that the government was unreasonable in its notification (ten months delay); its prosecution (nearly four years delay before filing

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2. Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

3. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

42 U.S.C. § 7413(b).

complaint); its litigation tactics (excessive discovery, etc.); and its settlement position (approximately ten times higher than the average Clean Air case).

This Court has concluded that the Clean Air Act applies here, but the standard is essentially the same as for EAJA. *See, e.g., Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 163 (1990) (purpose of EAJA to permit challenge to "unreasonable governmental actions"). Where "the Government can show that its case had a reasonable basis both in law and fact, no award will be made." *Wilderness Society v. Babbitt*, 5 F.3d 383, 388 (9th Cir. 1993), quoting *League of Women Voters v. FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986). The Court can well understand Trident's frustration with the government's pursuit of this case and its failure to settle. The futility of trial is, of course, more readily determined after trial than before. Trident also has had to pay a high penalty for what were primarily the faults of others. But the law applies a strict liability standard to violations of NESHAP, and Trident is liable for the actions and inactions of the persons it hired to remove asbestos. Under the facts of this case and given the clear dictates of the law, the Court cannot conclude that the government was unreasonable in going to trial.

Trident, as an alternative, requests its statutory costs pursuant to EAJA (28 U.S.C. § 2412(a)). That section provides for an award of costs to a prevailing party as set out in 28 U.S.C. § 1920. The government opposes on the grounds that the Clean Air Act is the exclusive remedy here. This Court agrees that where Congress has specifically addressed the award of attorneys' fees for unreasonable governmental action, that remedy is exclusive. The Clean Air Act, however, is silent on the issue of statutory fees to the prevailing party. The Court of

Appeals for the District of Columbia has recognized that such costs are routinely awarded against the government even when the government's position has been substantially justified. *Grace v. Burger*, 763 F.2d 457, 458 n.4 (D.C. Cir. 1985). This Court will thus permit the taxing of costs against the government pursuant to 28 U.S.C. § 1920.

THEREFORE, Trident's motions for award of attorneys' fees is DENIED, but Trident will be awarded costs pursuant to 28 U.S.C. § 1920.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 1 day of August, 1994.

s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
United States District Judge

APPENDIX C — OFFER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED MAY 2, 1993

Honorable Carolyn R. Dimmick

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C92-1025

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRIDENT SEAFOODS CORPORATION, JAMES HINTON, TOM STAKKELAND,

Defendants.

OFFER OF JUDGMENT

TO: UNITED STATES OF AMERICA

AND: WILLIAM W. WESTERFIELD, III
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
1425 New York Avenue, N.W., Suite 10011
Washington, D.C. 20005

Appendix C

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant Trident Seafoods hereby offers to allow the following judgment to be taken against it in the above-captioned cause:

I. Trident will pay a civil penalty in the amount of Thirty Thousand Dollars ($30,000);

II. Trident will enter into a Consent Decree with the United States obliging itself to do the following:

A. Institute a company-wide asbestos control program identical to the control program set forth in Section V. of the Consent Decree approved by this Court in *United States v. Farwest Fisheries, Inc., et al.*, No. C60-864D (W.D. Wash.), a copy of which is attached hereto as Exhibit A.

B. Conduct an asbestos survey of all vessels and shore facilities and develop a company-wide asbestos abatement plan. A schedule and budget for this program is attached hereto as Exhibit B.

C. Expend at least One Hundred Thousand Dollars ($100,000) on asbestos abatement within the two years following entry of this Consent Decree.

The value of this Offer of Judgment is $271,181.25, inclusive of Plaintiff's costs. This Offer is made for the purpose specified in Rule 68 and is not to be construed either as an admission that Trident is liable in this action, or that the United States has suffered any damage.

Appendix C

DATED this 3rd day of May, 1993.

Respectfully submitted,

HELLER, EHRMAN, WHITE & McAULIFFE

By s/ Ralph H. Palumbo
Ralph H. Palumbo
Washington State Bar #4751
Matthew P. Bergman
Washington State Bar # 20894

APPENDIX D — OFFER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED JULY 2, 1993

Honorable Carolyn R. Dimmick

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C92-1025

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRIDENT SEAFOODS CORPORATION, JAMES HINTON, TOM STAKKELAND,

Defendants.

OFFER OF JUDGMENT

TO: UNITED STATES OF AMERICA

AND: WILLIAM W. WESTERFIELD, III
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
1425 New York Avenue, N.W., Suite 10011
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Appendix D

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant Trident Seafoods hereby offers to allow the following judgment to be taken against it in the above-captioned cause:

I. Trident will pay a civil penalty in the amount of Fifty Thousand Dollars ($50,000);

II. Trident will enter into a Consent Decree with the United States obliging itself to do the following:

A. Institute a company-wide asbestos control program identical to the control program set forth in Section V. of the Consent Decree approved by this Court in *United States v. Farwest Fisheries, Inc., et al.*, No. C60-864D (W.D. Wash.), a copy of which is attached hereto as Exhibit A.

B. Conduct an asbestos survey of all vessels and shore facilities and develop a company-wide asbestos abatement plan. A schedule and budget for this program is attached hereto as Exhibit B.

C. Expend at least One Hundred Thousand Dollars ($100,000) on asbestos abatement within the two years following entry of this Consent Decree.

The value of this Offer of Judgment is $291,181.25, inclusive of Plaintiff's costs. This Offer is made for the purpose specified in Rule 68 and is not to be construed either as an admission that Trident is liable in this action, or that the United States has suffered any damage.

Appendix D

DATED this 2nd day of July, 1993.

Respectfully submitted,

HELLER, EHRMAN, WHITE & McAULIFFE

By s/ Ralph H. Palumbo
Ralph H. Palumbo
Washington State Bar #4751
Matthew P. Bergman
Washington State Bar # 20894
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Washington State Bar # 19473

Supreme Court, U.S.
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(2)

No. 96-725

In the Supreme Court of the United States

OCTOBER TERM, 1996

TRIDENT SEAFOODS CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Fed. R. Civ. P. 68 operates to shift attorneys' fees in an enforcement action reasonably brought by the United States under Section 113 of the Clean Air Act, 42 U.S.C. 7413.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 92 F.3d 855. The order of the district court (Pet. App. 21a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1996. The petition for a writ of certiorari was filed on November 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (Act) requires the Environmental Protection Agency (EPA) to prescribe Na-

tional Emission Standards for Hazardous Air Pollutants (NESHAP) at levels providing an ample margin of safety to protect public health. 42 U.S.C. 7412(c). The EPA establishes reporting requirements for owners and operators of emissions sources subject to regulation under the Act. 42 U.S.C. 7414(a). Owners and operators that intend to renovate a facility involving the stripping or removal of certain asbestos materials are required to provide the EPA with a timely, advance, written notice of intent to renovate a facility. 40 C.F.R. 61.145, 61.146. A violation of that notice requirement is a violation of the Clean Air Act. 42 U.S.C. 7412(e)(5). Section 113 of the Act authorizes the EPA to bring enforcement actions for civil penalties and injunctive relief to remedy violations of the Act. 42 U.S.C. 7413.

2. Petitioner is a seafood processing corporation that, in May 1988, began renovating an abandoned fish cannery in Anacortes, Washington. Pet. App. 2a. The renovation included the removal of asbestos insulation. Petitioner hired a general contractor, James Hinton, who subcontracted with a friend, Thomas Stakkeland, to conduct the work. Over the course of five days in August and September 1988, Stakkeland, who was not certified at the time to remove asbestos, performed renovation work involving asbestos. Stakkeland's 11-year-old son, who had no prior experience in asbestos removal, assisted in the work. After the work was supposedly completed, at least five bags of asbestos were left at the facility. *Id.* at 2a-3a.

On September 26, 1988, an inspector for the state regulatory agency, the Northwest Air Pollution Control Authority (NWAPCA), learned of the asbestos removal. The state inspector subsequently inspected the facility and removed samples of the suspected

asbestos for analysis. The analysis revealed that all samples contained more than one percent asbestos. NWAPCA collected further samples, all of which tested positive for asbestos. On September 30, 1988, petitioner notified the State of its intent to remove asbestos from the Anacortes facility. In October, 1998, a consulting firm hired by petitioner disposed of the five remaining bags of asbestos. Petitioner eventually hired a new asbestos contractor who, on October 14, 1988, removed an additional 25 bags of asbestos. Pet. App. 3a. NWAPCA ultimately fined petitioner $250 for failing to notify the State of the planned asbestos abatement. *Ibid.*

In August 1989, the EPA served petitioner with a request for information regarding petitioner's asbestos removal activities. In April 1992, the Department of Justice informed petitioner that the asbestos removal activities had been referred to it for enforcement pursuant to Section 113 of the Clean Air Act, 42 U.S.C. 7413. The government also advised petitioner that it had the opportunity to settle the matter before the Department filed suit under Section 113. Pet. App. 4a. Ensuing negotiations did not result in settlement and, on June 29, 1992, the United States brought an action under Section 113 against petitioner, Stakkeland, and Hinton alleging one notice violation and four work practice violations of the Act. Pet. App. 4a-5a. On May 3, 1993, petitioner made an offer of judgment under Fed. R. Civ. P. 68, which included a $30,000 civil penalty and a consent decree agreeing to various abatement-related activities. Pet. App. 5a. On May 19, 1993, the United States rejected that offer. On July 3, 1993, petitioner made a second offer of judgment that was identical to the previous offer, except that petitioner offered to pay a $50,000 civil

penalty. The United States also rejected that offer. *Ibid.*

On July 22, 1993, the district court granted summary judgment in favor of the United States on the claim that petitioner unlawfully failed to provide notice of its asbestos removal, and the court set the remaining four work practice claims for trial. Pet. App. 5a-6a. Shortly before trial, the United States made a settlement offer of $125,000, which petitioner rejected. *Id.* at 6a. After trial, the jury returned a verdict in favor of petitioner on the work practice violations. The district court assessed a $65,000 penalty against petitioner for the notice violation. Petitioner appealed that assessment, and the Ninth Circuit reversed.[1] *Ibid.*; *United States* v. *Trident Seafoods Corp.*, 60 F.3d 556, 557 (1995). On remand, the district court imposed a penalty of $25,000 less the $250 previously paid. Pet. App. 6a.

3. On January 24, 1994, petitioner moved for an award of its costs and attorneys' fees pursuant to (1) Fed. R. Civ. P. 68[2]; (2) the Equal Access to Justice

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[1] The court of appeals held that the district court erred in finding that petitioner's notice violation was continuous. *United States* v. *Trident Seafoods Corp.*, 60 F.3d 556, 559 (1995). The court remanded to the district court to impose a fine of no more than the statutory maximum amount of $25,000 for a one-day violation of the Act. *Ibid.*

[2] Rule 68 provides, in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted,

Act (EAJA), 28 U.S.C. 2412(d)(1)(A)[3]; and (3) Section 113(b) of the Clean Air Act.[4] Pet. App. 21a. The district court granted petitioner's motion for costs, but denied petitioner's request for attorneys' fees. *Id.* at 21a-28a.

The court rejected petitioner's contention that it was entitled to an award of attorneys' fees under EAJA and the Clean Air Act because the government was unreasonable in bringing suit. Pet. App. 26a-27a. The court concluded that "[u]nder the facts of this case and given the clear dictates of the law," the government was reasonable "in going to trial." *Id.* at 27a. The court also rejected petitioner's claim that Fed. R. Civ. P. 68 required an award of attorneys' fees, because petitioner's offer of judgment exceeded

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> either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.*

Fed. R. Civ. P. 68 (emphasis added).

[3] 28 U.S.C. 2412(d)(1)(A) provides, that, except as otherwise specifically provided by statute, fees shall be awarded to a prevailing party other than the United States in an action brought by or against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

[4] Section 113(b) of the Act provides that "[i]n the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable." 42 U.S.C. 7413(b).

the government's recovery at trial. Pet. App. 22a-26a. The court reasoned that "Rule 68 * * * does not apply to the United States as the plaintiff in an action brought under the Clean Air Act. The basis for awarding attorneys' fees has been laid out by Congress in the Clean Air Act, and will not be expanded here." Pet. App. 26a.

Over the government's objection, the district court awarded petitioner its costs under EAJA, 28 U.S.C. 2412(a), which permits a prevailing party to recover the costs enumerated in 28 U.S.C. 1920. Pet. App. 27a-28a. Petitioner appealed the denial of attorneys' fees, and the government appealed the award of costs. *Id.* at 2a.

4. The court of appeals affirmed the district court's decision denying petitioner's request for attorneys' fees. Pet. App. 2a-14a.[5] The court of appeals observed that, under this Court's decision in *Marek* v. *Chesny*, 473 U.S. 1 (1985), "[t]he term 'costs' in Rule 68 is intended to refer to all costs properly awardable under the relevant substantive statute." Pet. App. 8a. Noting that "[t]he Clean Air Act indicates that Congress did not intend to award attorneys' fees unless the action was unreasonable," the court concluded that "[t]he only interpretation that gives meaning to every word in both Rule 68 and the Clean Air Act is the 'costs' in Rule 68 include attorneys' fees only if the action was unreasonable." *Id.* at 8a-9a.

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[5] The court of appeals also affirmed the district court's award of costs under EAJA. Pet. 14a-20a. The court of appeals rejected the government's contention that costs could not be awarded against the government unless the government was found to have been unreasonable under Section 113 of the Clean Air Act. Pet. App. 17a-19a. That issue is not before the Court.

The court found unpersuasive petitioner's contention that limiting Rule 68 fee awards to only those fees allowable under Section 113(b) would deprive Rule 68 of "any independent operative force." Pet. App. 9a. The court explained that "Rule 68 is not intended to expand the bases for recovery of attorneys' fees." *Ibid.* The court also reasoned that its interpretation of Rule 68 would continue to "force the government to scrutinize more closely the reasonableness of its action when faced with an offer of judgment," because "[i]f the government concludes that the court is likely to find that the action is unreasonable, the offer of judgment is more likely to be accepted." *Ibid.*

The court also upheld the district court's finding that the government was reasonable in bringing the action against petitioner under the Clean Air Act.[6] Pet. App. 12a-14a. After reviewing the evidence, the court concluded that "although the government may not deserve commendation for the manner in which the action was maintained, its legal and factual foundation cannot reasonably be disputed." *Id.* at 13a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

The court of appeals correctly determined that in an action brought by the government under Section 113 of the Clean Air Act, a defendant is not entitled to

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[6] The court did not consider the reasonableness of the government's conduct prior to filing the action. Pet. App. 12a n.4. That question is not before the Court.

attorneys' fees under Rule 68, unless that action is unreasonable. This Court in *Marek* v. *Chesny*, 473 U.S. 1 (1985), held that "costs" subject to shifting under Rule 68 include attorneys' fees only "where the underlying statute defines 'costs' to include attorney's fees." 473 U.S. at 9. The Court explained that "Rule 68 does not come with a definition of costs" but "rather * * * incorporates the definition of costs that otherwise applies to the case." *Id.* at 9-10 n.2. Thus, Rule 68 shifts attorneys' fees to the rejecting offeree only if those fees are "properly awardable under the relevant substantive statute." *Id.* at 9.

Petitioner contends that, because Section 113 defines "costs" awardable under that Section to include attorneys' fees, "such fees are subject to the cost-shifting provision of Rule 68." Pet. 10 (quoting *Marek*, 473 U.S. at 9). That argument, however, ignores the express limitation in Section 113 that those fees are awardable against the government only if the government's "action was unreasonable." 42 U.S.C. 7413(b). That limited waiver of sovereign immunity is strictly construed. See *United States* v. *Idaho*, 508 U.S. 1, 7 (1993); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

Petitioner concedes that the courts of appeals are "in accord" that "attorney fees [a]re not subject to Rule 68 unless the substantive requirements of the underlying statute [a]re satisfied." Pet. 9 n.6 (collecting cases). Nor does petitioner challenge the court of appeals' ruling (Pet. App. 13a) that the government's action under Section 113 of the Clean Air Act "cannot reasonably be disputed." See Pet. 6 n.5. Accordingly, the court of appeals was correct in concluding that petitioner's attorneys' fees are not within the scope of

Rule 68, because those fees are not "properly awardable" under Section 113.

Petitioner also argues (Pet. 7) that the court of appeals' decision "renders Rule 68 completely inoperative" and "frustrates" the settlement purposes of Rule 68, because a Rule 68 defendant can never recover attorneys' fees unless the defendant is already entitled to those fees under Section 113 of the Clean Air Act. As the court of appeals explained, however, when the government is faced with a Rule 68 offer of judgment in an action under the Clean Air Act, it must "scrutinize more closely the reasonableness of its action" before declining an offer of judgment before trial. Pet. App. 9a. Thus, Rule 68 does have force in actions brought under Section 113 of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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